

THE MOOT COURT HONOR SOCIETY
TEMPLE UNIVERSITY JAMES E. BEASLEY SCHOOL OF LAW

2011-2012 Moot Court Honor Society Executive Board

President, Albert N. Antonelli

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August 23, 2011

Dear Moot Court Candidate,

Thank you for your interest in joining the Moot Court Honor Society. On behalf of the Executive Board and current members of the Moot Court Honor Society, I am proud to invite you to compete in the 2011 Samuel Polsky Moot Court Selection Competition.

The Moot Court Honor Society is an organization of outstanding law students who are devoted to excellence in written and oral appellate advocacy. In pursuing this goal, the Moot Court Honor Society shall require the highest standards both as a condition of earning membership, and as a condition of maintaining membership. The Moot Court Honor Society has been a Temple institution for decades and many of Pennsylvania's most respected jurists are alumni members.

Everything you need to compete for an invitation to join Temple Law's Moot Court Honor Society is included within this packet. Please carefully read the materials and instructions. Should you have any questions or concerns, please feel free to contact our Polsky Competition Chairperson, Inna Goykhman, at goykhman@temple.edu.

Although the selection process is demanding, I am confident that your participation in the Polsky Competition will be rewarding. I wish you the best of luck and hope you enjoy the competition.

Sincerely,

Albert N. Antonelli

President, Moot Court Honor Society
Temple University Beasley School of Law

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2011 Samuel Polsky Moot Court Selection Competition Schedule

August 23, 2011	Polsky problem released
September 6, 2011	Briefs must be submitted to the Moot Court Honor Society between 11:00 A.M. and 1:00 P.M. Location to be announced.
September 17, 2011	First Round of Oral Arguments
September 24, 2011	Second Round of Oral Arguments
October 11, 2011	Semi-Final Round of the Polsky Competition
October 18, 2011	2011 Polsky Competition Finals

2011 Samuel Polsky Moot Court Selection Competition Brief Writing Instructions

- 1) Please read the following documents before continuing:
 - a. Honor Code document
 - b. Transcript Release Form
- 2) You are to write a brief for either Petitioner (Philip Douglas) or Respondent (United States). It is your choice as to which side to argue.
- 3) Regardless of which side you choose to argue, both sides must address the specific question presented.
- 4) Brief scoring is anonymous. **Your name should not appear anywhere on your brief.** Include your TUID number along with the page number in the lower-right corner of each page of your brief. (ex. 123456789, 1)
- 5) Your brief **must not** be longer than nine (9) pages, double-spaced.
- 6) Your brief should start with the Question(s) Presented, immediately followed by your Argument section, and end with a Conclusion. Do not provide a statement of facts, procedural history, table of contents or any other section normally found in a brief to be submitted to a court of law. We are only interested in your Argument and Conclusion sections.
- 7) Your brief is to be written in Times New Roman twelve-point font.
- 8) One-inch margins are to be used on all pages.
- 9) Briefs for Petitioner (Douglas) must be submitted with a BLUE cover sheet. Briefs for Respondent (United States) must be submitted with a RED cover sheet. Each cover sheet must contain the case name and your TUID number. **Your name must not appear anywhere on the cover sheet.** The cover sheet does not count toward the nine page limit.
- 10) **THREE COPIES OF YOUR BRIEF MUST BE SUBMITTED TO THE SUBMISSION ROOM BY 1:00 P.M. ON SEPTEMBER 6, 2011. THE 1:00 P.M. DEADLINE IS FIRM. ABSOLUTELY NO SUBMISSIONS WILL BE ACCEPTED AFTER 1:00 P.M.** The submission room location will be announced prior to the deadline.
- 11) Staple your briefs in the upper-left corner. **Do not** staple your Transcript Release Form to your briefs. Your Transcript Release Form must be submitted **separately**.

- 12) This is a CLOSED competition, which means only the cases listed on the “2011 Polsky Competition Case List” and the materials included within this packet are to be cited in your brief. You may also use:
 - a. A non-legal dictionary
 - b. A legal dictionary
 - c. The Bluebook: A Uniform System of Citation, 18th ed. [for transfer students only]
 - d. ALWD Citation Manual
- 13) You must make all citations according to the ALWD format unless you are a transfer student, in which case you may use either ALWD or Bluebook.
- 14) When citing materials in the competition packet proper citation format must be followed. You should **not** assume that citations contained in the competition packet are correctly formatted.
- 15) Until your briefs are submitted, you may not discuss this problem with **anyone**.
- 16) Once your briefs have been submitted, you may discuss this problem with other competitors; however, you are prohibited from speaking about this problem with faculty, students not participating in the competition, legal professionals, and other similar persons.
- 17) You are bound by the Law School’s Code of Conduct.
- 18) Failure to abide by these rules may result in point reductions or elimination from the Polsky Competition.
- 19) All questions should be directed to the Polsky Competition Chairperson, Inna Goykhman, at goykhman@temple.edu. Questions may not be addressed to the faculty or other students, including current and alumni members of the Moot Court Honor Society. Ms. Goykhman will **not** answer questions regarding the substance of this problem or your argument. She will only answer questions regarding competition rules. Please place “POLSKY COMPETITION QUESTION” in the subject line of your email.

2011 Samuel Polsky Moot Court Selection Competition Oral Argument Instructions

- 1) During the preliminary rounds of oral arguments you will be required to argue both on-brief (i.e. the party you decided to argue for in your brief) and off-brief (i.e. the opposing party).
- 2) You **must** prepare your own oral argument.
- 3) You **may** practice your oral arguments with other law students; however, you **may not** practice your argument in front of, or receive advice or coaching from, faculty members, attorneys, or current and alumni members of the Moot Court Honor Society.
- 4) Your arguments will be judged by current and alumni members of the Moot Court Honor Society, faculty and legal practitioners, including Temple Law alumni. You will be scored based on your presentation, preparation, persuasiveness of argument, and response to questions. As each panel of judges is different, you should be prepared to argue for either a “hot bench” (many questions from judges) or a “cold bench” (very few questions from judges).
- 5) Your oral arguments will be limited to fifteen (15) minutes per round. If you are arguing for the Petitioner, you **may** reserve up to five (5) minutes for rebuttal. The time you request will be deducted from your total allotted time (ex. if a Petitioner requests five minutes, his or her argument will be limited to ten minutes). If you are arguing for the Respondent, you **may not** reserve time for rebuttal.
- 6) Each round of oral arguments will have a timekeeper/bailiff, who will be responsible for keeping time and announcing when your time has expired. Judges have discretion to allow competitors to exceed the time limit when necessary.
- 7) Your overall score in the Polsky Competition will be calculated in the following manner: 50% of your brief score, 25% of your score for the first preliminary round of oral arguments, and 25% of your score for the second preliminary round of oral arguments will be summed to calculate your overall score in the competition. Up to 20 competitors who earn the highest overall scores will receive an invitation to join the Moot Court Honor Society.
- 8) 8 competitors who earn the highest overall scores will advance to the semi-final round of oral arguments. Semi-finalists will argue once for either Petitioner or Respondent.

- 9) The judges for the semi-final round will select the four strongest advocates to advance to the final round of oral arguments. Selection of finalists will be based exclusively on the semi-final round of oral arguments.
- 10) The judges for the final round of oral arguments will select a Champion and a Runner-Up based solely on the finalists' oral arguments in the final round.
- 11) All questions should be directed to the Polsky Competition Chairperson, Inna Goykhman, at goykhman@temple.edu. Questions may not be addressed to the faculty or current and alumni members of the Moot Court Honor Society. Ms. Goykhman will **not** answer questions regarding the substance of this problem or your oral argument. She will only answer questions regarding competition rules. Please place "POLSKY COMPETITION QUESTION" in the subject line of your email.

2011 Samuel Polsky Moot Court Selection Competition Frequently Asked Questions

Q: Am I eligible to participate in the Polsky Competition?

A: All students in good academic standing who have completed at least two full-time semesters of law school are eligible to participate in the Polsky Competition. Additionally, third-year, evening and transfer students are all encouraged to participate in the Polsky Competition. Please note that evening students are not eligible to participate in the Polsky Competition until their third and fourth years in law school.

Q: Are third-year law students eligible to participate in the Polsky Competition?

A: Yes. However, Moot Court members are traditionally only permitted to compete in outside competitions after successfully completing the Appellate Advocacy class. Third-year students will only be permitted to compete in outside competitions with unanimous approval from the Executive Board of the Moot Court Honor Society.

Q: What are the duties and obligations of being a Moot Court member?

A: Students selected for an invitation to join the Moot Court Honor Society are automatically registered in an Appellate Advocacy course in the Spring Semester, which is only open to Moot Court members. At the end of the Appellate Advocacy course, all students compete in the I. Herman Stern Moot Court Competition. Members earn 3 credits for successfully completing this course and it fulfills the research paper component of the upper level writing requirements.

During the second year of membership on Moot Court, members are required to compete in one moot court competition outside of the law school. Members receive 2 additional credits for meeting this requirement.

Lastly, Moot Court members are required to judge members practicing their oral arguments for outside competitions. Members are required to “moot” competing members at least four times but are encouraged to do more.

Q: Can I be a member of the Moot Court Honor Society and also be on trial team and/or a journal?

A: Yes. Several current members of the Moot Court Honor Society are also members of Trial Team, Law Review, and/or a Journal.

Q: Who can I contact if I have more questions or concerns?

A: Please contact our Vice President and Polsky Competition Chairperson, Inna Goykhman, at goykhman@temple.edu with questions related to the competition. Please place “POLSKY COMPETITION QUESTION” in the subject line of your email.

Our President, Albert Antonelli, can also be contacted at albert.antonelli@temple.edu with any questions regarding membership in the Moot Court Honor Society. Please place “MOOT COURT QUESTION” in the subject line of your email.

Before FAIGEN, ROSEN and SMITH, Circuit Judges.

FAIGEN, Circuit Judge:

Before the court is an appeal by Philip Douglas, from an order of the United States District Court for the Eastern District of Pennsylvania holding that GPS surveillance did not constitute a search under the Fourth Amendment.

Pennsylvania state police officers placed a GPS tracking device in Appellant's car and eventually caught him with two kilograms of crack cocaine and \$250,000 in cash. Douglas moved to suppress this evidence and the court denied his motion holding that GPS tracking does not constitute a search. Douglas appealed. We limit our discussion to the question of whether GPS tracking constituted a search, and more specifically, to the question of whether there was a subjectively and objectively reasonable expectation of privacy that was violated. For reasons discussed below, we affirm the decision of the district court.

I. BACKGROUND

On April 13, 2010, at 11:35 P.M., Philip Douglas parked his car on the street in front of his Philadelphia home at the corner of 46th and Walnut Streets. He then went inside his home to sleep for the night. While Douglas slept, Pennsylvania state police officers, acting on an anonymous tip of suspected drug dealing activity, placed a GPS device in Douglas's trunk. The trunk appeared to be locked, but opened easily with some force. The device sent tracking information regarding the car's location to police headquarters in Harrisburg. The information was then relayed to a Philadelphia police station. The GPS device only monitored the location of the car. It had no capability to record sound.

Douglas was thought to be a career drug dealer. Police also had information that Douglas was a skilled smuggler of crack cocaine and had been for at least five years. Although his reputation had been public knowledge, police officers never obtained information about where he lived. The anonymous caller tipped them off as to his name and where he resided.

For the next two weeks, police officers monitored where Douglas went and the times he went to those locations. No other information was monitored or collected. After realizing that Douglas went to the same warehouse between the hours of 2:00 A.M. and 3:00 A.M. on five different occasions, police stationed three squad cars at the location and waited for him to arrive. The warehouse was located on a gated plot of land. The police officers approached the guard, explained the situation and were granted access to the property.

The police officers set up watch. When Douglas finally arrived, he walked to the back of his car, removed a dark duffel bag and proceeded toward the warehouse where another man was waiting.

Police officers observed Douglas hand the duffel bag to the unidentified man and receive a briefcase in return. At that point, four officers got out of the hidden squad cars and yelled to the two men to freeze and drop what they were holding. Douglas looked frightened and took off running. All four officers pursued him on foot without weapons drawn. Two hundred feet down a side street, they eventually grabbed hold of Douglas and tackled him to the ground. Douglas continued to struggle with, kick and hit the officers. Douglas was hogtied to prevent him from running away or injuring the officers.

While the four officers restrained and arrested Douglas, the remaining officers opened the duffel bag and discovered two kilograms of pure crack cocaine. Upon opening the padlocked briefcase, the officers discovered \$250,000 in cash. Douglas was escorted to the police station and was eventually indicted on Federal narcotics charges.

II. DISTRICT COURT DECISION

Douglas moved to suppress both the money and crack cocaine from evidence contending that the officers would never have obtained them as evidence had they not engaged in an unlawful search by employing the GPS tracking device. The district court held that Douglas had neither an objective nor subjective expectation of privacy, because the GPS tracking device was attached to a car parked in a public space and monitored while traveling on public roads. Hence, there was no search and no Fourth Amendment violation. Douglas's motion to suppress was therefore denied. Douglas appeals and we affirm.

III. DISCUSSION

Appellant brings this appeal alleging that the district court erred in denying his motion to suppress, because he had both an objectively and subjectively reasonable expectation of privacy concerning his whereabouts. Appellant further contends that use of a GPS tracking device to monitor his whereabouts constituted an unreasonable search under the Fourth Amendment. We disagree.

This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our review is plenary. *McGreevy v. Stroup*, 413 F.3d 359, 363 (3d Cir. 2005).

“[T]he proponent of a motion to suppress bears the burden of proving not only that the search . . . was illegal, but also that he had a legitimate expectation of privacy in [the place searched].” *United States v. Stearn*, 597 F.3d 540, 551 (3d Cir. 2010). The Supreme Court has held, agreeing with the language from Justice Harlan's concurrence in *Katz v. U.S.*, 389 U.S. 447 (1967), that a search does not occur unless “the individual manifested a subjective expectation of privacy in the object of the challenged search,” and “society [is] willing to recognize that expectation as reasonable.” *Cal. v. Ciraolo*, 476 U.S. 207, 211 (1986). The test has been generally thought of as having two prongs: a

subjective one, whether the individual seeks to protect something private, and an objective one, whether the individual's expectation is objectively justifiable. *Smith v. Md.*, 442 U.S. 735, 740 (1979).

More specifically, the Supreme Court has consistently held that when deciding what government-initiated electronic surveillance constitutes a search, a court will use the analysis put forth in *Katz*. In *Katz*, government agents attached an electronic listening device to a phone booth. Using this device, the agents intercepted a telephone conversation that Katz had while inside the telephone booth. *Id.* at 347. The court found that Katz was unconstitutionally subjected to a search because he “justifiably relied” upon the privacy of the booth. *Id.* at 353. The court expressly rejected the proposition that a search can only occur when there has been a “physical intrusion” into a “constitutionally protected area” because the Fourth Amendment “protects people not places.” *Id.* at 351-353. We decide today whether the appellant has shown a subjective and objective expectation of privacy.

B.

Appellant argues that use of the GPS device violated a subjectively reasonable expectation of privacy. In order to do so, he must show that he manifested an expectation of privacy in the property searched. *U.S. v. Kennedy*, 09-1980, 2011 WL 891689 (3d Cir. 2011) (citing *California v. Greenwood*, 486 U.S. 35, 39 (1988)). Appellant, as well as the dissent, argues that Appellant had a subjective expectation of privacy concerning the trunk of his car. However, this argument does not conform to a Fourth Amendment analysis. Appellant's trunk was not searched. The “search” here was the GPS surveillance of Appellant's vehicle. Thus, the relevant question becomes, did Appellant have a subjectively (and objectively) reasonable expectation of privacy in his travels. For the same reasons discussed below, we find that he did not have a subjective expectation of privacy.

The tougher issue is whether Appellant had an objectively reasonable expectation of privacy in his whereabouts while traveling in his car. To this point, Appellant argues, as does the dissent, that the holding in *U.S. v. Knotts*, 460 U.S. 276 (1983) is not controlling to our analysis today. We disagree. The court in *Knotts* held that a “person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to the other.” *Id.* at 281. In *Knotts*, police officers planted a tracker in a can of chemicals before it was bought by Knotts's co-conspirator. *Id.* at 278. Police officers then tracked the car that was carrying the can until it got to Knotts's residence. *Id.* The Court found that because the car was traveling on public roads, anyone who wanted to look could see the car and so there was no objectively reasonable expectation of privacy. *Id.* at 281. The Court reasoned that if visual surveillance does not raise constitutional issues, then “scientific enhancement” of similar surveillance does not create an objectively reasonable expectation of privacy. *Id.* at 285.

Further, there is a lesser expectation of privacy in a car, because it is rarely used as a home or “repository of personal effects.” *Knotts*, 460 U.S. at 281. A car traveling on public thoroughfares is in plain view for all to see. Visual surveillance reveals the routes a car travels and its ultimate destination. Nothing private within the car is revealed, so an individual must have a lesser expectation of privacy where the car travels than in his activities when he enters a home or other building. A constitutional expectation of privacy is triggered, however, when a person exits his car and enters a home or other building, because his whereabouts are no longer in public view. *Id.* at 281-282. While Douglas was driving his car, he had no reasonable expectation of privacy because he was traveling on public routes where anyone could have seen him. Although Douglas drove into a gated area, had the police been employing visual surveillance instead of using a GPS tracking device, they still would have been able to gain access onto the property. Further, the court in *Minnesota v. Carter*, 525 U.S. 83 (1998) held that drug dealers who are legitimately on someone else’s premises do not have an objectively reasonable expectation of privacy in the premises. *Id.* at 91. The dissent mischaracterizes the evidence and assumes that the guard on the premises knew the appellant. This is simply not in the facts.

The dissent argues that the decision in *Knotts* is not controlling and takes issue with the statement that “if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” *Knotts*, 460 U.S. at 285 (citing *Zurcher v. Stanford*, 436 U.S. 547, 566 (1978)). The dissent finds this language reserves judgment on the issue of whether prolonged surveillance is a search. However, although never addressed by this circuit, the Seventh, Eighth and Ninth Circuits have all held that GPS tracking of a vehicle, even for longer than just one trip, does not constitute a search. *U.S. v. Garcia*, 474 F.3d 994 (7th Cir. 2007) (holding there was no search when a GPS was attached to a vehicle); *U.S. v. Marquez*, 605 F.3d 604 (8th Cir. 2010) (holding that attaching a GPS device to a car parked in public is not a search); *U.S. v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010) (holding that no privacy expectation exists in the undercarriage of one’s vehicle). Also, the fact that in the instant case police officers continued to monitor Appellant’s car for two weeks does not negate the notion that the activities that were monitored occurred on public streets. Now, this case would be different had the GPS been attached to an object that could be brought wherever Douglas went. In that case, the tracking could go as far as to monitor the most private of places. But because the police were simply monitoring the car, which remained in public view, there was no search.

The Supreme Court’s concern over technology that captures information, which otherwise could not be obtained without a physical intrusion by officers, does not overrule the holding of *Knotts*. For instance, in *Kyllo v. U.S.*, 533 U.S. 27 (2001), the Supreme Court held that use of thermal imaging to measure heat emanating from a home was a search. *Id.* at 40. The Court’s reasoning focused on the fact that the thermal imaging device was not in general public use and was used to search the inside of a private home, something that would have been “unknowable” without an intrusion. *Id.* Even though the Court had previously held that visual surveillance of a home was not a

search in *Ciraolo v. City of New York*, 531 U.S. 993 (2000), it nonetheless distinguished *Ciraolo* by holding that the actions in *Kyllo* involved more than just visual surveillance. The police in *Kyllo* used a device to measure something that could not have been visually verified.

The law must adapt to changing technology and simply because police can now sit in an office and monitor a car's location instead of watching from their cars does not mean that what they are doing is a search. Had the police officers followed the car themselves, without the use of a GPS tracking device, their actions would certainly not constitute a search. It would be unreasonable for this court to say then, that just because the police can now monitor a car more efficiently, that use of advanced technology violates a privacy interest that is not violated by tailing a car. "Nothing in the Fourth Amendment prohibit[s] police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology." *Knotts*, 460 U.S. at 283.

In *U.S. v. Karo*, 468 U.S. 705 (1984), the Court did find that placing a beeper inside a can of ether was a search because the beeper was monitored while the can was inside defendant's house. In the instant case, however, the privacy interests are too far removed. While in *Karo* the court found that monitoring private property withdrawn from public view is a threat to privacy interests, the police in the present case did not view something that could not have been viewed with their own eyes. The GPS tracked Douglas's car from his home, on public streets, to another location, something that anyone who wanted to look, could see or follow. The GPS device never entered the privacy of Douglas's home. In other words, the GPS device was not used to discover contraband in an individual's home. It was simply used to track a car along public routes. "The eye cannot by the laws of England be guilty of a trespass." *Boyd v. U.S.*, 116 U.S. 616, 628 (1886). The GPS here simply aided police surveillance of a vehicle. The Supreme Court has never found that police efficiency is unconstitutional, and we do not intend to do so today.

C.

Although the Third Circuit has not squarely addressed this issue, other circuits have. Three circuits have held that GPS surveillance of car is not a search, while one has held to the contrary. The Ninth Circuit has found that the use of a tracking device, attached to the undercarriage of a vehicle was not a search. *Pineda-Moreno*, 591 F.3d at 1215. In that case, a Drug Enforcement Administration agent noticed a man purchasing fertilizer commonly used to grow marijuana. *Id.* at 1213. The officer followed the man to his house. Over a series of months, the agent commenced an investigation by attaching small tracking devices to the underside of the man's car. The tracking device was attached to the man's car on seven different occasions. *Id.* One of the tracking devices alerted the agent that the car was leaving a grow site, so agents followed the car, pulled it over and detected the aroma of burning marijuana. *Id.* at 1214. The court held

there had been no reasonable expectation of privacy in the undercarriage of the vehicle and the use of a tracking device did not constitute a search. *Id.* at 1215. The court reasoned that since the officers had not entered the defendant's home and had not trespassed on private property, the defendant could not claim that the police entered an area in which he had a reasonable expectation of privacy. *Id.* at 1214.

Similarly, the Seventh Circuit has held that a search did not occur when police officers placed a GPS tracking device underneath the defendant's vehicle. *U.S. v. Garcia*, 474 F.3d 994 (7th Cir. 2007). The court reasoned that there is not an important distinction between police following a car and using cameras or a GPS device to watch a car. *Id.* at 997. The GPS device was simply a substitute for following a car on a public road, something that does not constitute a Fourth Amendment search. *Id.*

Additionally, the Eighth Circuit has held that use of a GPS device to track a truck used by a drug trafficking operation was not a search. *U.S. v. Marquez*, 605 F.3d 604 (8th Cir. 2010). The court stated:

When police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable amount of time.

Id. at 609-610. The court focused its reasoning on the fact that the car was parked in a public place, a parking lot, when the tracking device was attached.

The D.C. Circuit has refused to follow the lead of the other circuits. The court in *Maynard* found that warrantless use of a GPS device on the defendant's vehicle for a month was a search. *Maynard*, 615 F.3d at 553. The court found the holding in *Knotts* was not controlling. It distinguished its facts from those of *Knotts* by finding that the surveillance in *Knotts* was for one day, whereas the surveillance in *Maynard* occurred 24 hours a day for an entire month. The court interpreted *Knotts* to say that it reserved judgment for prolonged surveillance. While the courts in *Pineda-Moreno*, *Garcia* and *Marquez*, have all acknowledged that *Knotts* reserved a particular issue, the reserved issue is "wholesale" or "mass" electronic surveillance of many individuals, something not at issue in either *Maynard* or the instant case. *Id.* at 558.

The use of the GPS device in this case was simply not a search. A parked car, on a public street, in front of an individual's house, is viewable by anyone who wants to see it. Therefore, when police officers placed the GPS device in Douglas's car, they did not violate his privacy interest. Although the officers placed the GPS device in a closed trunk, that fact is of no moment. The information emitting from the device would have been the same had it been attached with a magnet to the undercarriage of the vehicle, as the officers did in *Pineda-Moreno*.

IV. CONCLUSION

Philip Douglas traveled by car along public routes, allowing anyone to observe where he was going. Police officers employing technology that mimics the functioning of a human eye does not constitute a search under the Fourth Amendment. Because Appellant's expectation of privacy was neither objectively nor subjectively justifiable, there was no search and no Fourth Amendment violation. We therefore affirm the decision of the court below.

Rosen, J., DISSENTING:

The majority holds that the use of a GPS tracking device by police to monitor a vehicle's movements is not a search under the Fourth Amendment. I respectfully disagree.

I. Background

On April 13, 2010, at 11:35 P.M., at the corner of 46th and Walnut Streets in Philadelphia, Appellant Philip Douglas parked his Toyota Camry on the street in front of his house. He checked the doors of the car and the trunk to make sure they were locked, and proceeded to enter his home. A few hours later, while Appellant slept, Pennsylvania state police officers drove up to Appellant's vehicle, jimmied the locked trunk open, and placed inside a small GPS device.

Appellant was thought to be involved in a state-wide drug smuggling ring involving various types of narcotics, specifically crack cocaine. After police received an anonymous tip revealing the location of Appellant's home, a plan was formulated to place a GPS device in Appellant's vehicle so police officers could obtain evidence regarding Appellant's movements, contacts and transactions. The police never obtained a warrant.

The device used is a technological advancement from the tracking beepers of yesteryear; movement information can be sent to the central police headquarters in Harrisburg, which can then relay the information back to a satellite office in Philadelphia. The device is capable of tracking a vehicle's movements from up to 1200 miles away. For two weeks, police officers gathered information about which locations Appellant was traveling to, when he was traveling to those locations, and how long he stayed at each location. On five separate occasions, Appellant drove to a warehouse between the hours of 2:00 A.M. and 3:00 A.M. The warehouse was part of a private building area, which was gated, and the warehouse itself was one mile back from the gate. A private guard stood watch, and had to let Appellant in every time; and did so without checking for identification.

At the end of the two weeks, the police (satisfied with the information obtained) began to stake out the warehouse. Police informed the guard about the situation and, with the guard's permission, hid three squad cars around the warehouse. Each night, the

police would wait for Appellant to return. A few nights later, Appellant did in fact arrive. After turning the engine off, Appellant exited his vehicle and removed two duffel bags from the backseat of the car. He then proceeded to the rear entrance of the warehouse where another man was waiting. The officers in the hidden squad cars observed Appellant hand the duffel bags to the unidentified man and receive a briefcase in exchange. Immediately, the officers exited the squad cars and yelled at both of the men to freeze and drop what they were holding. Appellant took off running and four of the officers gave chase. Appellant only made it approximately 200 feet down a side road when the officers caught up to him, knocked him to the ground, and hogtied him to keep him restrained. The remaining officers detained the unidentified “second man” and seized both of the duffel bags and the briefcase. The second man turned out to be the owner not just of the warehouse, but of the entire private building area. The duffel bags contained two kilograms of crack cocaine, while the briefcase contained \$250,000 in unmarked bills. Appellant was arrested and indicted on federal narcotics charges.

Subsequently, Appellant moved to suppress the crack cocaine and the money as evidence on the grounds that his Fourth Amendment rights were violated. Appellant claimed that GPS surveillance of a vehicle is a “search” under the Fourth Amendment and therefore requires a warrant to be valid. The court below denied the motion, holding that the use of the GPS tracking device was not a “search” because there is no legitimate expectation of privacy in “a person’s travels.” Appellant was convicted and now appeals. The question that comes before us today is whether the use of the GPS device to track Appellant’s vehicle was a search under the Fourth Amendment.

II. Discussion

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. It is well-settled law in this country that in order for a “search” to occur, there is a “twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy [in the place to be searched] and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Here, there was both a subjective and objective expectation of privacy.

A. The Placing of the Device

We must begin by discussing an important issue that the majority dismisses much too quickly: whether or not the very act of placing the device in Appellant’s vehicle violated a legitimate expectation of privacy. The Supreme Court has held that “[a]

search, even of an automobile, is a substantial invasion of privacy.” *U.S. v. Ortiz*, 422 U.S. 891, 896 (1975). While “[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a ‘search,’” *New York v. Class*, 475 U.S. 106, 114 (1986), a person *does* have “privacy interests in a car’s trunk or glove compartment,” *U.S. v. Ross*, 456 U.S. 798, 823 (1982); *see also U.S. v. Frazier*, 538 F.2d 1322, 1326 (8th Cir. 1976) (Ross, J., concurring) (no search because “[n]o invasion of the interior of the car occurred”). We have stated that an owner of a vehicle “ha[s] [a] reasonable expectation of privacy in the interior of the vehicle,” *U.S. v. Mosley*, 454 F.3d 249, 252 (3d Cir. 2006), and specifically, we have reasoned that police intrusion into a trunk is a search requiring probable cause, *U.S. v. Rickus*, 737 F.2d 360, 367 (3d Cir. 1984). The Ninth Circuit, however, has merely stated that placing a tracking device on the *undercarriage* of a vehicle violated no privacy interest, *U.S. v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010); *U.S. v. McIver*, 186 F.3d 1119, 1126-1127 (9th Cir. 1999) (reasoning that the officers did not pry into a hidden or enclosed area), while the Tenth Circuit found that “[t]he *undercarriage* is part of the car’s exterior, and as such, is not afforded a reasonable expectation of privacy,” *U.S. v. Rascon-Ortiz*, 994 F.2d 749, 754 (10th Cir. 1993) (emphasis added).

This case is clearly distinguishable from the circuit court cases cited. The device was not placed on any exterior part of the vehicle. The police had to physically *break in to the trunk* and place the device therein. For all intents and purposes, the police *entered the interior of the vehicle*. When Appellant locked the trunk, he was clearly making efforts to keep any items present private. Therefore, there was obviously a subjective expectation of privacy in the trunk. Moreover, an expectation of privacy in a locked trunk of a vehicle is an expectation that society is prepared to (and already does) recognize as reasonable. Therefore, the police entered an area of the vehicle in which Appellant had an objective expectation of privacy. Placing the GPS device in the trunk was clearly a “search” under the Fourth Amendment. I would remand this case to determine if there was sufficient probable cause to conduct the search under the automobile exception to the warrant requirement. *See California v. Carney*, 471 U.S. 386, 390 (1985) (automobile exception to warrant requirement).

B. The Function of the Device

As stated earlier, this case should be remanded for a probable cause analysis because breaking into Appellant’s trunk was a search. However, the majority somehow finds that the manner in which the device was placed in the car entitles it to a separate analysis under the Fourth Amendment. The majority’s argument that GPS tracking is not a search, no matter how it is employed, must be addressed.

1. Expectation of Privacy in Movements as a Whole

The majority relies heavily on *U.S. v. Knotts* for its holding. 460 U.S. 276 (1983). In *Knotts*, an electronic tracking beeper was placed in a chemical container which the defendant subsequently purchased and placed in his vehicle. *Id.* at 278. The beeper acted as a sort of radar, and the police needed to follow the car closely in order to keep track of its location. *Id.* The Court stated that “[a] person traveling in an automobile on public

thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” *Id.* at 281. However, the majority mistakenly concludes that the *Knotts* analysis should end there. *Knotts* goes on to say that if “twenty-four hour surveillance of any citizen of this country . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” *Id.* at 283-284. The Court, therefore, expressly refused to rule on whether or not there is a reasonable expectation of privacy in the *constant tracking of every movement an individual* makes. The majority mischaracterizes the “twenty-four hour surveillance” statement as describing a situation in which *many* people are monitored using various devices and considers the statement inapplicable here. *Id.* However, the word, “any,” prefaces the word, “citizen.” *Id.* The Court could have just as easily used, “many,” “lots,” or various other words that denote plurality. Clearly, the holding of *Knotts* is not controlling in this case because appellant was monitored nonstop for two straight weeks. Here, the police were using a device that, for two weeks, continually sent Appellant’s location to an office located miles away. While an average person might be able to discern where Appellant was headed on one occasion just by looking, he certainly would not be privy to every one of Appellant’s movements for two straight weeks.

Few cases have squarely addressed whether continuous GPS surveillance constitutes a search under the Fourth Amendment. *See U.S. v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (GPS tracking is not “searching in Fourth Amendment terms”); *Pineda-Moreno*, 591 F.3d at 1217 (car being monitored with mobile tracking device was not a search); *but see U.S. v. Maynard*, 615 F.3d 544, 555-566 (D.C. Cir. 2010) (holding that warrantless use of GPS device on the defendant’s vehicle for a month was a search). In *U.S. v. Marquez*, the Eighth Circuit said that “[w]hen electronic monitoring *does not invade upon a legitimate expectation of privacy*, no search has occurred,” and the tracking must not exceed a “*reasonable period of time*.” 605 F.3d 604, 609-610 (8th Cir. 2010) (emphasis added). Here, the GPS tracking *did* invade upon a legitimate expectation of privacy *because* it was not done for a reasonable period of time.

The majority uses *Pineda-Moreno* in support of its argument that the monitoring in this case does not constitute a search. In *Pineda*, the officers had to install various tracking devices on the defendant’s Jeep “on seven different occasions.” *Pineda-Moreno*, 591 F.3d at 1213. While the devices did track the vehicle’s movements, and “[s]ome of [them] permitted agents to access the information remotely, . . . others required them to remove the device from the vehicle and download the information directly.” *Id.* This was clearly not the same continuous tracking as we have in this case. While the Ninth Circuit held that the tracking in *Pineda* was not a search, it did not have to address whether *continuous* tracking would have constitutional implications. *Id.* at 1217. *Pineda* argued that *Knotts* was not controlling solely due to the fact that *Kyllo v. U.S.*, 533 U.S. 27 (2001), “heavily modified the Fourth Amendment analysis applicable to [tracking] devices,” and said nothing about the difference between one-time surveillance and constant surveillance. *Knotts*, 460 U.S. at 283-284; *Pineda-Moreno*, 591 F.3d at 1216. Therefore, the Ninth Circuit had no reason to address the *Knotts* distinction. *Knotts*, 460 U.S. at 283-284. The court merely stated that the tracking devices did not “intrude into a constitutionally protected area,” because the “agents could

have obtained [the information] by following the car.” *Knotts*, 591 F.3d at 1216. *Pineda* simply does not shed light on how long is too long when it comes to GPS tracking. The devices used in *Pineda* were not comparable to the continuous tracking used in this case, and even if they were, that court did not address our issue and therefore should not be used as support in this case.

The majority also uses *Garcia* in its analysis. In *Garcia*, the tracking device used was “pocket-sized, battery-operated, [and] commercially available for a couple of hundred dollars.” *Garcia*, 474 F.3d at 995. Police had to “[retrieve] the device . . . [in order] to learn the car's travel history since the installation of the device.” *Id.* The Seventh Circuit found that the devices in *Garcia* and *Knotts* were “similar,” and compared them to various means of monitoring a vehicle, saying that “if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search.” *Id.* at 996-997. The court further stated that “GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.” *Id.* at 997. I disagree with this assessment.

First, *Garcia* was a much easier case than the one before us. The tracking device used was “similar” to the one in *Knotts*. Indeed, the police officers in *Garcia* had to retrieve the device to obtain information recorded by the device. *Garcia*, 474 F.3d at 995. Here, there is no physical proximity to the vehicle as there was in *Garcia*. Police did not have to retrieve any device and could monitor Appellant’s movements from a place that was nowhere near Appellant’s actual location. This is much less akin to “follow[ing] a car around.” *Id.* at 996-997. Secondly, satellite imaging cannot be compared to (human) visual surveillance of a car if the imaging is tracking *each one* of a vehicle’s movements *for two weeks straight*. Again, while a person may give up his privacy in traveling from one place to another, *Knotts*, 460 U.S. at 281, he certainly maintains a privacy interest in all of his travels over a prolonged period of time. The *Garcia* court fails to recognize this *Knotts* distinction. *Knotts*, 460 U.S. at 283-284. Perhaps this was because in *Garcia*, the tracking was not “continuous” in the way it is in this case, or perhaps the court concluded that the device was “close enough” to the device in *Knotts* and that its inquiry should end there. Either way, *Garcia* should not be used as support in this majority’s opinion.

The case that is more on point to the one before us is *Maynard*. In *Maynard*, police “track[ed the defendant’s] movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep.” *Id.* at 555. The D.C. Circuit stated that “[w]hen it comes to privacy . . . the whole may be more revealing than the parts.” *Id.* at 561. The *Maynard* court made clear that “unlike one's movements during a single journey, the whole of one's movements over the course of a month is not *actually* exposed to the public because the likelihood anyone will observe all those movements is effectively nil.” *Id.* at 558. The court held that the GPS tracking *was* a search *because* there was constant surveillance over a one month period. *Id.* at 559. This is exactly the point *Knotts* was trying to make with its dragnet distinction. 460 U.S. at 283-284. But how long is too long for constant surveillance?

In this case, we find ourselves in jurisprudential limbo – the tracking here was not limited to one trip, but was not as extensive as four weeks. We must then decide on a rule that is consistent with authority that is binding on this court. I would hold that two weeks of twenty-four hour surveillance is a clear search under the Fourth Amendment. No ordinary person would be able to view *all* of Appellant’s movements for two straight weeks. While Appellant may have exposed his traveling to public view for a single trip, he still maintains a privacy interest in his trips as a whole.

2. Expectation of Privacy in the Private Building Area

The technology in *Knotts* is not comparable to the technology before us today. In *Knotts*, police had to *physically follow* the defendant’s car in order to keep up with the tracking beeper and monitor the defendant’s movements. *Knotts*, 460 U.S. at 278. The Court reasoned that there was no legitimate expectation of privacy because the defendant “voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction.” *Id.* at 281-282. But in this case, we are significantly past the point of “looking.” See *U.S. v. Karo*, 468 U.S. 705, 715 (1984) (distinguishing *Knotts* on the basis of visual verification). The police were able to monitor Appellant’s movements *in a private area*. At least one court has stated that “[t]he Supreme Court might conclude . . . that th[is] new technology is so intrusive that the police must obtain a court order before using it.” *U.S. v. Berry*, 300 F. Supp. 2d 366, 368 (D. Md. 2004). In *Kyllo*, the Court held that information gathered by sense-enhancing technology “that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search -- at least where . . . the technology in question is not in general public use.” 533 U.S. at 34. Here, without this technology, police could only have seen Appellant be let through the gate, and nothing more. When the police began to observe Appellant’s movements inside the gate, it was information that could not have been obtained simply by watching Appellant on public roads. Therefore, we are now tasked with determining whether Appellant had a reasonable expectation of privacy in the “second man’s” private warehouse.

In *Minnesota v. Olson*, the Supreme Court held that an overnight guest in someone else’s home had a legitimate expectation of privacy, 495 U.S. 91, 96-97 (1990), while in *Minnesota v. Carter*, individuals who were legitimately on the premises of another but packaging cocaine were not entitled to a legitimate expectation of privacy. 525 U.S. 83, 91 (1998). In *Carter*, the Court reasoned that “[r]espondents . . . were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson, or that there was any other purpose to their visit.” *Carter*, 525 U.S. at 90. Other important factors in that case were “the purely commercial nature of the transaction engaged [in], the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder. *Carter*, 525 U.S. at 91.

Here, our situation is much different. While it does not rise to the “overnight guest” level of *Olson*, there is certainly more of an expectation of privacy than in the one-

time incident of *Carter*. Appellant visited this warehouse on numerous occasions; it was not for a mere few hours. In fact, Appellant visited so many times that the guard at the gate, knowing Appellant, would let him in without checking for identification. Clearly, Appellant had an established relationship with the owner of the premises. Moreover, while the purpose of the visits was undoubtedly commercial, there is still an expectation of privacy on commercial premises. See *O'Connor v. Ortega*, 480 U.S. 709 (1987). I would hold that because there were enough contacts between Appellant and the “second man” to make a reasonable inference that there was an established relationship, Appellant should have an expectation of privacy in the private warehouse.

The police clearly intruded on Appellant’s expectation of privacy. They used sense-enhancing technology to monitor Appellant’s movements in a private area. Therefore, because the police did exactly what *Kyllo* was trying to prevent, this was a search under the Fourth Amendment.

III. Conclusion

The GPS tracking of Appellant is a search under the Fourth Amendment because installing the device in Appellant’s trunk, monitoring his movements in a private area, and watching him continuously for two weeks violated both his subjective and objective expectation of privacy. Therefore, this case should be remanded to continue the Fourth Amendment analysis and determine whether or not the police had probable cause to search.

SUPREME COURT OF THE UNITED STATES

Present: Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, Justice Sotomayor, and Justice Kagan

CERTIORARI GRANTED

No. 11-7058. Philip Douglas v. United States, No. CR-S-95-325 WBS. Petition for writ of certiorari to the United States Third Circuit Court of Appeals granted.

QUESTION PRESENTED

Does continuous GPS surveillance of a vehicle over the period of two weeks constitute a “search” under the Fourth Amendment?

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV

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